No. 99-548

DEC 15 1999
CLERK

IN THE

Supreme Court of the United States

In Re: THE LESLIE FAY COMPANIES, INC.,

Debtors.

JACOB V. FALBAUM, ANTHONY GILL, LEE L. KISHBAUGH, EMILE LEWKOWIEZ, ELIZABETH MICHAUD and RAYMOND J. TERWILLIGER,

Petitioners,

—v.—

THE LESLIE FAY COMPANIES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ARTHUR M. WISEHART
Counsel of Record
WISEHART & KOCH
19 West 44th Street
Suite 412
New York, New York 10036
(212) 730-0044

Attorneys for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

IMPORTANT ISSUES WARRANT REVIEW AS RESPONDENTS' BRIEF ITSELF DEMONSTRATES 1

REVIEW IS WARRANTED BY THE CATCH-22 SITUATION IN WHICH PETITIONERS WERE PLACED 5

REVIEW IS ESPECIALLY IMPORTANT IN VIEW OF THE CONFLICT OF INTEREST ISSUES 8

TABLE OF AUTHORITIES

Cases	Page(s)
Aetna Ins. Co. v. Kennedy, 301 U.S. 389 (1937)	6
Chang v. Chang, 190 A.D.2d 311, 597 N.Y.S.2d 692 (1st Dep't 1993)	9
Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989)	1, 4
In re Leslie Fay Cos., Inc., 175 B.R. 525 (S.D.N.Y. 1994)	6
In re the Leslie Fay Cos., Inc. Sec. Litig., 161 F.R.D. 274 (S.D.N.Y. 1995)	9
Katchen v. Landy, 382 U.S. 323 (1966)	1, 2, 3
Langenkamp v. Culp, 498 U.S. 42 (1990)	4
Lytle v. Household Mfg., Inc., 494 U.S. 545 (1990)	3-4
Matter of Vicars Ins. Agency, 96 F.3d 949 (7th Cir. 1996)	5
Northern Pipeline Constr. Co. v. Marathon PipeLine Co, 458 U.S. 50 (1982)	2, 4

Shugrue v. Air Line Pilots Ass'n Int'l
(In re Ionoshpere Clubs, Inc.),
922 F.2d 984 (2d Cir. 1990), cert. denied,
502 U.S. 808 (1991) 5

Thomas v. Union Carbide Agric. Prods. Co.,
473 U.S. 568 (1985) 4

United States v. Gellene,
182 F.3d 578 (7th Cir. 1999) 8, 9

Constitutional and Statutory Provisions Involved

U.S. CONST. Article III 2, 4, 6-7, 7

U.S. CONST. Amend. VII 1, 7, 8

Bankr. Act of 1898, 30 Stat. 544 2

Federal Judgeship Act of 1984
(Pub. L. No. 98-353) 2

28 U.S.C. § 157(d) 1, 2, 3, 4

Age Discrimination in Employment
Act ("ADEA") 2, 3, 4, 5

29 U.S.C. § 626(c) 3

29 U.S.C. § 626(e) 3

REPLY BRIEF

IMPORTANT ISSUES WARRANT REVIEW AS RESPONDENTS' BRIEF ITSELF DEMONSTRATES

The principal contention of respondents, that no issues warrant review by this Court, is refuted by the cases cited in respondents' brief in opposition ("Br. Opp.").

Jury trial rights pursuant to the combined effect of the federal anti-discrimination statutes and 28 U.S.C. § 157(d) were not even tangentially involved and the cases mistakenly relied upon at pages 12 and 14 of respondents' brief.

Moreover, in Granfinanciera S.A. v. Nordberg, 492 U.S. 33 (1989), relied upon by respondents (Br. Opp. p. 12), Katchen v. Landy, 382 U.S. 323 (1966), is distinguished as not dependent upon the status of bankruptcy courts as courts of equity (492 U.S. at 57), but instead as requiring an analysis of the nature of the claim involved. (492 U.S. at 61)

In Granfinanciera, petitioner's jury trial rights were given effect even though the case, as herein, had been designated as one involving a "core" bankruptcy proceeding.

Granfinanciera stresses that jury trial rights derived from the Seventh Amendment cannot be eliminated merely by the relabeling of a cause of action and placing exclusive jurisdiction over it in "a specialized court of equity" (492 U.S. at 61), such as the bankruptcy court.

A basic difference between the instant case and

Katchen v. Landy is that the latter case was decided under the long since outmoded and discarded Bankruptcy Act of 1898, 30 Stat. 544 (382 U.S. at 327), but nevertheless relied upon by respondents and the courts below (Br. Opp. p. 11, fn. 4).

The ADEA of 1967 had not been enacted when Katchen v. Landy was decided. Age discrimination claims by former employees were never considered part of the traditional jurisdiction of bankruptcy courts. The long-established exercise of summary jurisdiction by bankruptcy courts for the recovery of property belonging to the estate as a result of voidable preferences that was involved in Katchen v. Landy therefore is inapplicable.

Further, the 1966 decision in Katchen v. Landy preceded the seminal decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

In addition, in 28 U.S.C. § 157(d), Congress has subsequently declared such claims to be mandatorily withdrawable to the district courts from the bankruptcy courts. 28 U.S. § 157(d) was not enacted until 1984, as part of the Bankruptcy Amendments and Federal Judgeship Act.

Under 28 U.S.C. § 157(d), removal or withdrawal of such discrimination claims to an Article III district court is mandated because their resolution would require "consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce."

Such "other laws" include statutes such as the Age Discrimination in Employment Act, 29 U.S.C. § 626(e) ("ADEA").[1]

Under the ADEA, a person with a claim thereunder is ". . . entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action." (29 U.S.C. § 626(c); emphasis added.)

This specific statutory language renders circular the contention of respondents that petitioners forfeited their jury trial rights by filing claims in the bankruptcy court because of the equitable nature of such proceedings. (Br. Opp. p. 11) The filing of such claims necessarily was subject to the mandatory withdrawal provisions of 28 U.S.C. § 157(d), as well as the guarantee of jury trial rights in the ADEA. Petitioners therefore were entitled to rely upon the belief that this statutory mandate would be given effect when the proofs of claims were filed.

Application of Katchen v. Landy, supra, is further barred by the proviso in the ADEA requiring jury trial rights to be made available "regardless of whether equitable relief is sought by any party in such action." 29 U.S.C. § 626(c).

Because of this precise statutory language, Lytle

---

[1] The statutory provisions involved are cited and quoted at pages 14 and 15 of the petition herein, and in the appendix at A 4 and A 17-20.

v. Household Manufacturing, Inc., 494 U.S. 545 (1990), is directly applicable. Under it the legal issues are required to be tried before a jury first in an Article III court notwithstanding the concurrent request for equitable relief.

Langenkamp v. Culp, 498 U.S. 42 (1990), cited in respondents' brief in opposition at p. 12, is similarly indicative of the importance of the issues presented for review because it also did not involve consideration or application of the mandatory withdrawal provisions of 28 U.S.C. § 157(d).

Another case relied upon by respondents (Br. Opp. pp. 14-15), Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985), also is indicative of the importance of the review of the questions presented. Like Granfinanciera and Langenkamp, Thomas involved neither 28 U.S.C. § 157(d) nor the ADEA. Moreover, omitted from respondents' brief is the pertinent quotation from the opinion in that case (which the brief in opposition wrongly cites at page 14 as appearing in 473 U.S. at 569, instead of at 584) observing that in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), "a divided court was unable to agree on the precise scope and nature of Article III's limitations."

Although 28 U.S.C. § 157(d) was enacted to implement the decision in Northern Pipeline, its applicability has never received consideration by this Court in the context of the jury trial rights that are specifically guaranteed by the federal anti-discrimination statutes.

Also supporting the importance of the issues that the petition presents for review are the decisions that respondents cite from Circuit Courts of Appeals. (Br. Opp. p. 15) Matter of Vicars Ins. Agency, Inc., 96 F. 3d 949, 954 (7th Cir. 1996), a case involving RICO. In Matter of Vicars, the court indicates that mandatory withdrawal apparently would be called for under the decisions when, as shown in the petition herein, "the proceeding presented a conflict between statutes, a question of first impression, or a constitutional challenge." (96 F. 3d at 953)

Shugrue v. Air Line Pilots Ass'n, Int'l (In re Ionosphere Clubs, Inc.), 922 F. 2d 984 (2d Cir. 1990), cert. denied, 502 U.S. 808 (1991) (Br. Opp. p. 15), similarly does not involve consideration of the jury trial guarantee found in the ADEA, and emphasizes that withdrawal from the jurisdiction of the bankruptcy court is necessary when cases such as the instant case, necessarily involve "substantial and material consideration of non-Bankruptcy Code federal statutes. . . ." (922 F.2d at 995)

REVIEW IS WARRANTED BY THE CATCH-22 SITUATION IN WHICH PETITIONERS WERE PLACED

Painfully apparent is the fallacy of respondents' central premise that petitioners had "voluntarily" agreed to the bankruptcy court's jurisdiction by filing a proof of claim (Br. Opp. p. 11).

A Catch-22 situation faced the petitioners. In order to assert their discrimination claims against their former employer, as required by the federal

discrimination laws, it was necessary for them to file such claims in the bankruptcy court. However, because the former employer itself had first invoked the jurisdiction of the bankruptcy court, and thereby received an automatic stay on the institution of other judicial proceedings, petitioners had no choice in the matter. Moreover, the time within which such claims could be asserted in court was rapidly expiring.

Petitioners "voluntarily" agreed to nothing; when they filed their proofs of claims in the bankruptcy court, they did so because they had to in order to protect their interests.

To treat what had to be done to preserve the existence of such claims as a voluntary waiver of the jury trial rights that are an intrinsic part of them is contrary to the long-standing principle that because "the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver," as stated in Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937).

Petitioners were not responsible for causing the bankruptcy proceeding; they were victims of it. As the bankruptcy court found, the bankruptcy proceeding was "unusual in that it was a direct consequence of fraud that had been perpetrated against the company, its shareholders, and creditors." In re Leslie Fay Cos., Inc., 175 B.R. 525, 533 (S.D.N.Y. 1994).

Respondents also mislead in asserting that the abrogation of petitioners' rights by determination of their claims in bankruptcy court proceedings instead of before a jury in an Article III court is needed for "the

orderly administration of bankruptcy estates. . . ." (Br. Opp. p. 11, fn. 4)

The fallacy of this contention is exposed by the next footnote in respondents' brief in which they concede that ordinary personal injury negligence claims and wrongful death claims are not required to be determined in bankruptcy courts but in Article III district courts before juries. (Br. Opp. p. 11, fn. 5)

Since the determination of ordinary personal injury actions arising under states law does not need to made by bankruptcy courts in order to facilitate "the orderly administration of bankruptcy estates," the illogic of contending that discrimination claims entitled to jury trials under federal statutes and the Seventh Amendment are required to be treated differently from ordinary negligence actions is manifestly worthy of this Court's attention.

Respondents assert that there is no basis to distinguish discrimination claims from the "myriad of other claims as to which a creditor loses the right to jury trial if he or she files a proof of claim." (Br. Opp. p. 17) In footnote 10, however, respondents impliedly admit the error of their statement regarding the "myriad of other claims" by acknowledging that even with regard to ordinary "personal injury tort" claims, the filing of a proof of claim does not cause creditors to lose the right to jury trial in a constitutional court. (Br. Opp. p. 17)

The anomaly under which even ordinary state law negligence claims are entitled to be determined by constitutional courts before juries, notwithstanding the

filing of proofs of claims by the plaintiffs, but not discrimination cases arising under federal statutes, even though the federal statutes explicitly so provide, should be addressed, particularly in view of the constitutional dimensions of the issue under the Seventh Amendment.

REVIEW IS ESPECIALLY IMPORTANT IN VIEW OF THE CONFLICT OF INTEREST ISSUES

United States v. Gellene, 182 F.3d 578 (7th Cir. 1999), illustrates a drastic difference in the attitude toward the issue of the non-disclosure of conflicting interests by attorneys.

A footnote in the Gellene opinion indicates that, according to the bankruptcy court, "New York is different from Milwaukee [where] . . . . Professional things like concepts [of interest] are taken very, very seriously. (182 F.3d at 583, fn. 4)

A perjury conviction involving non-disclosures of conflicting interests of a prominent New York law firm, Milbank Tweed, was affirmed in the Gellene case, and the law firm also was required to disgorge the $1.8 million in fees that it had received to the bankruptcy estate. (Gellene, fn. 9)

The Seventh Circuit's careful analysis of such issues compared with the cursory non-citable summary order written by a "Deputy Clerk" for an "Acting Clerk" generated by the Second Circuit in the instant case is indicative of a marked disparity in the treatment of such issues. (1a-4a)

The Gellene opinion also rejects the narrow view on materiality expressed in Collier on Bankruptcy, stating that, "We have no doubt that a misstatement in a Rule 2014 statement by an attorney about other affiliations constitutes a material misstatement. * * * This requirement goes to the heart of the administration of the bankruptcy estate." (182 F.3d at 588)

Non-compliance with the disclosure requirements and multiple conflicts of interest by the attorneys representing the debtors herein is clear as the United States Trustee found. (177a-179a) Moreover, respondents' assertion that "there is no *per se* rule that prohibits a debtor's counsel from *simultaneously* representing a corporate debtor and its principals" as contended by respondents (Br. Opp. p. 18, fn. 13) is flatly contrary both to the Seventh Circuit's decision in Gellene and to the applicable ethics requirements of New York law as well. See Chang v. Chang, 190 A.D.2d 311, 597 N.Y.S.2d 692, 697 (1st Dep't 1993).

Consideration of the conflict of interest issues presented is of particular importance in view of the findings that the same attorneys were involved in a continuing attempt to conceal the evidence of the pervasive pattern of fraudulent conduct that admittedly perpetrated by clients of the law firms involved that was root cause of this bankruptcy proceeding in the first place as shown by In re the Leslie Fay Cos., Inc. Sec. Litig., 161 F.R.D. 274, 280-81 (S.D.N.Y. 1995).

Such conduct also characterized the self-dealing of management during the bankruptcy proceeding when in the Pomerantz-dominated management of Leslie

Fay, acting under the supervision of its attorneys, approved the payment of $1,069,579.22 to Laura Pomerantz in consideration of a release of a fraudulent age discrimination claim that Mrs. Pomerantz, the terminated wife of the Chairman of the Board, admitted to be non-existent. This occurred at the same time when huge amounts of attorneys' fees were being paid to the same conflicted lawyers to facilitate a strategy intended to deprive petitioners of their constitutional and statutory jury trial rights for the determination of their own discrimination claims. (TR 5/29/97 at pp. 397-400; TR 6/16/97 at pp. 629-631, Exh. L.)

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR M. WISEHART
Counsel of Record
WISEHART & KOCH
19 West 44th Street, Suite 412
New York, New York 10036
(212) 730-0044

Counsel for Petitioners